

General Information Letter: Nexus issues are generally not an appropriate subject for letter rulings.

November 6, 2001

Dear:

This is in response to your letter dated October 22, 2001 in which you request a letter ruling. The nature of your letter and the information provided requires that we respond with a General Information Letter (GIL). A GIL is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c). Department of Revenue Regulations may be accessed from the Department's web site at www.revenue.state.il.us/legalinformation/regs.

Your letter states as follows:

Your revenue auditor, Ms. Phyllis D. Mondy has just completed an examination of our records in conjunction with a sales tax audit. It is her opinion that COMPANY may not be liable for income tax in the state of Illinois and advised that we get a legal opinion.

COMPANY manufactures ITEMS in our CITY facility for shipment to various locations both in and out of STATE. When we ship a ITEM to Illinois, it is installed at the customer's location by a subcontractor. In the state of Illinois, COMPANY has no employees, no salesmen and no buildings.

Please advise at your earliest convenience whether we are liable for income tax in Illinois. Your cooperation will be appreciated.

RULING

The determination whether a taxpayer has nexus with Illinois is extremely fact-specific. Therefore, the Department does not issue rulings regarding whether a particular taxpayer has nexus with the State. However, general information regarding nexus with Illinois for income tax purposes may be provided.

Constitutional Jurisdiction

The United States Constitution restricts a state's power to subject to income tax foreign corporations. The Due Process Clause requires that there exist some minimum connection between a state and the person, property, or transaction the state seeks to tax (*Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992)). Similarly, the Commerce Clause requires that a state's tax be applied only to activities with a substantial nexus to the taxing state (*Id.*). Where any part of a foreign corporation's income is allocable to Illinois in accordance with the provisions of Article 3 of the Illinois Income Tax Act ("IITA" ; 35 ILCS 5/301 – 304), Illinois can demonstrate the connection or nexus necessary to subject a foreign corporation to tax. Therefore, unless protected by Public Law 86-272, a foreign corporation is liable for Illinois income tax where any portion of its income is allocated to Illinois.

IITA section 304 provides for taxable years ending on or after December 31, 2000 that the apportionment factor for a foreign corporation deriving business income from Illinois and one or more

other states shall be equal to its sales factor. Section 304(a)(3)(A) defines the sales factor as a fraction, the numerator of which is the total sales of the person in Illinois during the taxable year, and the denominator of which is the total sales of the person everywhere. Department of Revenue Regulations ("regulations") section 100.3700(c)(1) states that gross receipts from sales of tangible personal property are allocable to Illinois for sales factor purposes if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sale. Regulations section 100.3370(c)(3) provides that gross receipts from the sale of intangible personal property are allocable to Illinois if the income producing activity that gave rise to the receipts is performed wholly in Illinois, or the income producing activity is performed in Illinois based on costs of performance.

Your letter indicates that COMPANY ("COMPANY") sells ITEMS to purchasers in Illinois. Assuming that sales of its ITEMS constitute sales of tangible personal property, a portion of COMPANY's net income is allocable to Illinois in accordance with the provisions of Article 3 of the IITA. Accordingly, unless protected by Public Law 86-272, COMPANY may be liable for Illinois income tax.

Public Law 86-272

Public Law 86-272, 73 Stat. 555, 15 U.S.C.A. 381 (1959) states in part:

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either or both of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

In *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 227, 112 S.Ct. 2447, 2456 (1992), the Supreme Court determined that business activities constituting "solicitation of orders" include activities ancillary to requests for purchases. In addition, the Court announced that a taxpayer does not forfeit protection under P.L. 86-272 by engaging in *de minimis* activities that exceed solicitation of orders. (*Wrigley*, 505 U.S. at 231, 112 S.Ct. at 2458) Accordingly, a taxpayer is not protected under P.L. 86-272 where it engages in Illinois in business activities that may not be considered solicitation, or activities ancillary thereto, and that are not *de minimis*.

Regulations section 100.9720(c)(4) lists specific activities considered beyond mere solicitation and therefore unprotected by P.L. 86-272. Section 100.9720(c)(4)(C) includes in the category of unprotected activities the installation or supervision of installation by or on behalf of the taxpayer at or after shipment or delivery.

Regulations section 100.9720(c)(6) provides that P.L. 86-272 protects certain in-state activities engaged in by independent contractors that would not be protected if performed by the taxpayer's

employees or other representatives. Such activities consist of (i) soliciting sales, (ii) making sales, and (iii) maintaining an office.

Your letter indicates that subcontractors install COMPANY's ITEMS sold to purchasers in Illinois. Assuming such installation is conducted on its behalf, COMPANY is not protected by P.L. 86-272 from Illinois income tax. A subcontractor's installation of a taxpayer's tangible personal property sold within the state may not be considered solicitation. Likewise, installation is not an activity that may be engaged in by an independent contractor without the loss of protection under P.L. 86-272. Accordingly, COMPANY may be liable for Illinois income tax on all of its income allocable to Illinois in accordance with Article 3 of the IITA.

As stated above, this is a GIL. A GIL does not constitute a statement of policy that applies, interprets or prescribes the tax laws, and it is not binding on the Department. If you are not under audit and wish to obtain a binding private letter ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of 86 Ill. Adm. Code 1200.110(b). If you have questions regarding this GIL you may contact Legal Services at (217) 782-7055. If you have further questions related to Illinois income tax laws, visit our web site at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Sincerely,

Brian L. Stocker
Staff Attorney (Income Tax)